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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CLARA WATSON,

Petitioner,

—v.—

FORT WORTH BANK & TRUST,

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE NOW LEGAL DEFENSE AND EDUCATION FUND, THE WOMEN'S LEGAL DEFENSE FUND, *AMICI CURIAE*, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1/]

This brief amici curiae is submitted, pursuant to Rule 36.2 of the Rules of this Court, by the American Civil Liberties Union, the NOW Legal Defense and Education Fund, and the Women's Legal Defense Fund,[2/] and is filed in support of appellant Clara Watson.

STATEMENT OF THE CASE

Fourteen years ago, in 1973, Fort Worth Bank and Trust ("the Bank") hired Clara Watson, a black woman, as a proof operator. Watson v. Fort Worth Bank & Trust, 798 F 2d 791, 793 (5th Cir. 1986).[3/] At that time, the Bank employed only four other blacks in

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[1/] The parties have consented to the filing of this brief, and their letters of consent are being filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

[2/] Individual statements of interest for the amici are set forth in an Appendix to this brief.

[3/] References to 798 F.2d 791 (5th Cir. 1986), are to the published Fifth Circuit opinion in this case.

its fifty member work force: the porter, the kitchen attendant, and two others who printed checks in the basement. 798 F.2d at 808 (Goldberg, J., dissenting). Watson was assigned to work in a back room, where she was not visible to the Bank's customers. In 1975, Watson approached Gary Shipp, the bank's senior vice-president for personnel, and informed him of her interest in becoming a teller. Shipp rebuffed Watson with the remark that tellers have to handle too much money "for blacks." Tr. I18-19.

Notwithstanding this expression of overt racial bias, Watson was eventually promoted to a teller trainee and, after a short training period, became a teller in the motor bank, in January 1976. 798 F.2d at 793. She was later transferred to the main lobby and subsequently promoted to the position of commercial teller on February 2, 1980. Id.

In 1980 and 1981 Watson sought appointment to four supervisory vacancies in succession. Id. The Bank's selection criteria for hiring and promotion are non-existent or ambiguous because supervisors make promotions decisions according to their best judgment. The evidence showed that the individual who supervised a position made the employment decisions concerning subordinates, including promotion decisions, and although subject to routine review by management, those decisions were rarely reversed. Id. at 796. Richard Burt, who made the promotion decision in three of the four instances at issue here, testified at trial that he considered an applicant's experience, leadership, previous supervisory experience, ability to get along with others, and "fifty or one hundred other factors." Tr. III44-45. Although each employee was subject to annual performance evaluation reviews on a

scale of twelve categories,[4/] these performance evaluations were used primarily for salary review and did not play a substantial role in the promotions at issue here. 798 F.2d at 799.

In February 1980, Watson applied for the position of supervisor of tellers. Richard Burt, a white male, who was then supervisor of the bookkeeping department, was

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[4/] Many of the categories used in the performance evaluations are by their nature highly ambiguous. The twelve categories are: 1) accuracy of work; 2) alertness; 3) personal appearance; 4) supervisor-co-worker relations; 5) quantity of work; 6) physical fitness; 7) attendance; 8) dependability; 9) stability ("the ability to withstand pressure and remain calm in most situations"); 10) drive ("ambition"); 11) friendliness and courtesy; and 12) job knowledge. 798 F.2d at 812 n.26 (Goldberg, J., dissenting).

The rating system used to measure the categories is also subjective: 0-1, "does not meet minimum requirements"; 2-3, "does just enough to get by"; 4, "volume of work is satisfactory"; 5-6, "very industrious does more than is required"; 7-8, superior work production record." Id. Therefore, even the categories with seemingly objective content, such as "quantity of work performed," may become discretionary and subject to the rater bias inherent in such highly discretionary employment systems. See Point IA, infra.

selected. Both the district court and the Fifth Circuit credited the Bank's explanation that it had promoted Burt due to his greater experience.[5/] Although Watson had been at the bank six years longer than Burt, Burt had a year of supervisory experience in the bookkeeping department that Watson lacked. 798 F.2d at 793-94 & n.1.

Watson then applied for the position of supervisor of motor bank tellers. Burt, as supervisor of all tellers, selected Pat Cullar, a white woman, for the job. Again, Cullar was assertedly chosen for her greater experience. She had four fewer years experience than Watson at the Bank, but had seventeen years experience at another bank. Like Watson, she had no supervisory experience. The overall performance

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[5/] Although Burt had higher performance evaluations than Watson, "the district court clearly placed primary emphasis on Burt's ... experience." 798 F.2d at 799.

evaluation scores of Watson and Cullar were comparable (Watson scored 70 and Cullar 72, out of a possible 104). Id. at 794, 799.

Third, Watson applied again for lobby teller supervisor in 1981, after the Bank promoted Burt to assistant vice-president.[6/] Burt, the new supervisor of the position, selected Pat Cullar for this position too. Id. at 794.

Finally, as a result of Cullar's second promotion, Watson again applied for the supervisor of motor bank tellers. Burt selected Kevin Brown, a young white man, for the position. Brown had been at the bank just one year at the time of his promotion, and had worked only part-time for the first six months. See id. at 794 n.3. Although Brown had only "supervis[ed] teenage seasonal

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6/ Watson applied for this and the fourth promotion while on sick leave. 798 F.2d at 794. However, the Bank did not rely on this fact as a reason for its denial of the promotions. Id. at 799.

employees," at Six Flags Over Texas, an amusement park, id., the Bank relied on this meager supervisory experience as its reason for promoting Brown over Watson, id. at 799. The Fifth Circuit noted that Brown's promotion was also based on Cullar's "high ... recommendation, relying on his performance as a teller and as her assistant." Id. However, Brown's ratings were actually comparable to Watson's; Cullar rated him 80 in January 1980 and 89 in January 1981; Richard Burt rated Watson 84 in July 1980, her last written evaluation. Watson v. Fort Worth Bank & Trust, No. 4-81-581-E, slip. op. at 5 (Nov. 21, 1984).[7/]

The Bank's subjective policies for hiring and promotion have significantly

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[7/] Brown did not last long in his new position. In the September 1981 evaluation Cullar rated Brown's performace as a motor bank supervisor "fair" and his potential as "some." He resigned soon after, on December 3, 1981. Id.

impacted on black applicants and employees. Watson showed that a black applicant who applied for any job with the Bank had one-fourth the chance of a white applicant to get the job. 798 F.2d at 808 (Goldberg, J., dissenting). Specifically, of 533 white and 144 black applicants during a period of over four years, 16.7% of the whites and 4.2% of the blacks received offers of employment. Id. at 811. Watson's expert testified that the disparity was significant at 0.0001; the probability that the result was due to chance is one in ten thousand.[8/] Id. The pattern repeated itself with regard to applicants for teller positions, at the 0.01 significance level, and for applicants for clerical positions, at the 0.05 significance

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8/ Watson's statistical evidence was so compelling that discriminatory intent could be inferred under Title VII disparate treatment analysis. See Point II, infra.

level.[9] Id.

Watson also demonstrated that black employees were evaluated more severely than white employees, were paid less, and were advanced much more slowly in responsibilities and promotions. Id. at 808. Black employees were paid on average approximately $46 a month less for comparable work. Id. They advanced at a rate six-tenths of a pay grade per year less than the equally qualified white.[10] Id. A comparison of annual evaluations over four years showed that

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[9] Significance at the 0.01 and at the 0.05 level means that there is a one percent and five percent probability, respectively, that the disparity is due to chance. For large samples such as this, this Court's requirement of two or three standard deviations "is essentially equivalent to a rule requiring significance at a level in the range below 0.05 or 0.01. Id. at 810 (quoting Baldus & Cole, Statistical Proof of Discrimination § 9.03, at 297 (1980) (other citations omitted)).

[10] For all these comparisons, Watson's experts performed multiple regression analyses to control for factors such as educational level and prior experience. Id. at 812-13.

blacks rated an average of eleven to fifteen points lower than their non-black co-workers, differences that are statistically significant. Id. at 812-13. These facts are not surprising, given that the Bank has never had a black director or officer, or even a black supervisor. Id. at 808.

The Bank did not offer any evidence to explain these disparities. Id. at 810 n.19; Tr. III307. It also did not present any evidence as to the business necessity for its hiring and promotion policies.

SUMMARY OF ARGUMENT

The facts of this case demonstrate how facially neutral but subjective selection devices operate precisely like paper and pencil tests or height requirements, to the disproportionate disadvantage of women and minorities, regardless of the intent of the decision-maker. Because subjective systems are so susceptible to abuse in operation,

through conscious or unconscious bias, they should be subject to the "more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives," Washington v. Davis, 426 U.S. 229, 247 (1976), that Title VII requires for objective criteria.

Title VII demands that employers whose employment practices significantly disadvantage certain groups of employees, a showing easily made in this case, examine in a systematic and rational way the content of their jobs and the qualifications necessary to perform the job in order to insure, ultimately, that satisfactory employees are selected in a non-discriminatory fashion. Title VII imposes the same requirements regardless of whether an employer has initially elected to use facially neutral objective screening devices, or facially neutral subjective screening systems. It

would be anomalous, indeed, if subjective devices, which are so subject to conscious and unconscious abuse, were to receive greater judicial deference than objective devices, which are undeniably neutral in their content and application.

In this case, the evidence of race-based discrimination is so strong that it not only demonstrates the requisite "disparate impact," but also suffices to justify an inference of intentional discrimination. Under any theory of Title VII liability and recovery, the Bank inexcusably discriminated against Clara Watson.

ARGUMENT

Introduction

In the approximately quarter century since Title VII was enacted, employment discrimination and litigation to combat it have entered a new era. In 1964, overt

discriminatory practices were commonplace,[11] as were diploma requirements and standardized screening devices which disproportionately excluded minorities and women.[12] Judicial enforcement of our national commitment to equality of individual opportunity has largely eliminated overt discrimination in employment,[13] and many forms of invidious testing and screening practices have likewise been successfully curbed.[14] However, rather than devising new job-related objective

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11/ E.g., Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (employer did not accept applications from mothers with young children); Claiborne v. Illinois Central R.R., 583 F.2d 143 (5th Cir. 1978), cert. denied, 442 U.S. 934 (1979) (black employees classified as laborers; white employees as apprentices).

12/ See Griggs v. Duke Power Co., 401 U.S. 424 (1971) (diploma requirement); Dothard v. Rawlinson, 433 U.S. 321 (1977) (minimum height and weight requirements).

13/ E.g., Arizona Governing Committee v. Norris, 463 U.S. 1073 (1983) (invalidating unequal benefits for men and women in state retirement plan).

14/ See, e.g., cases cited in footnote 12, supra.

selection devices, many employers have shielded discriminatory decision-making by adopting subjective, often undefined, selection processes. These in turn pose new barriers, barriers that are often insurmountable unless Title VII's disparate impact analysis is used to challenge them.

This case exemplifies a widespread problem which severely limits the full integration into the American workplace of many employees whom Title VII was expressly intended to protect. Clara Watson was not denied promotions because she lacked identifiable qualifications, such as a high school diploma, that she could obtain in order to qualify. Although her performance reviews reveal that she was a competent employee, her efforts to progress were thwarted four times, on each occasion by operation of a supervisor's subjective assessment of "fifty or one hundred" other

factors which were never identified.

All of Watson's supervisors were white, and their judgments varied in each instance to disfavor Watson. Watson had more years of general banking experience than Richard Burt, so the Bank relied on Burt's supervisory experience; Watson had more experience at the Bank and she and Pat Cullar both lacked supervisory experience and had comparable evaluations, so the Bank relied on Cullar's greater years of general banking experience; Watson had more banking experience than Kevin Brown and comparable evaluation ratings, so the Bank credited Brown's brief supervisory experience at an amusement park more highly than Watson's eight years of successful service to the Bank.[15/] These criteria did not impact only on Watson; at the time of

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15/ As even the Fifth Circuit recognized, the Bank's explanations for not promoting Watson are "somewhat inconsistent." 798 F.2d at 799.

trial, Fort Worth Bank, which employed 79 people, still had no black supervisors.

The barriers faced by Clara Watson and other employees at the Bank confront many minority and female employees. Despite significant advances for these groups, the large scale effects of discrimination, both intentional and unintentional, persist. The median weekly earnings and occupational choices of minority and female employees lag far behind those of white males. Median weekly earnings for full-time employees in 1983 were $397 for white men, $253 for white women, $299 for black men, $231 for black women, $274 for Hispanic men and $209 for Hispanic women.[16/] The Bureau of Labor Statistics reports that "the very highly paid professional and managerial occupations are

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16/ Bureau of the Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 419 (1985).

still predominantly male."[17/] As of August 1985, 13.5% of white male workers held executive administrative, and managerial jobs, in contrast to 6.2% of black male workers, 9.7% of white female workers, and 6% of black female workers at these levels.

17/ Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 2168, Women at Work: A Chartbook iii, 28 (Apr. 1983).

I. TITLE VII'S DISPARATE IMPACT ANALYSIS APPLIES TO SUBJECTIVE CRITERIA

A. Subjective Criteria Are The Kind Of "Built-In Headwinds" Prohibited by Title VII

As this Court recognized in Griggs v. Duke Power Co., Title VII prohibits not only intentional discrimination, but also "practices that are fair in form, but discriminatory in operation." 401 U.S. at 424, 431 (1971). Subjective criteria, like objective criteria, are "facially neutral" when applied without discriminatory intent, but by their nature are even more susceptible than objective criteria to abuse, in that they can conceal covert and unconscious bias and thus have a severely discriminatory impact.

Subjective selection criteria present an almost unparalled opportunity for bias. They conceal the most difficult and evasive form of discrimination: the hidden, subtle and

possibly subconscious preferences of the decision-makers to select others with their own cultural experience and background. The failure to identify qualities essential to job performance, and the reliance instead on highly discretionary factors, which may bear little or no relevance to successful job performance, as in this case, characterize this subtle but invidious form of discrimination. Cultural bias, whether incorporated in tests or individual decision-making, is precisely the kind of "built-in headwind[]" Title VII was intended to eliminate. Griggs, 401 U.S. at 432.

The subjective assessment often varies infinitely in its application among applicants. As manifested by Richard Burt, who testified that he considered fifty or one hundred factors, careful job analysis rarely informs the subjective preference for certain personality traits. Individuals who screen

applicants are seldom trained in job analysis and can easily substitute untutored bias for a rational approach to decision-making. For example, personnel officers may simply decide in the abstract that ambition or perseverance are good qualities in all employees. Worse, they may consciously or unconsciously prefer applicants who most resemble themselves.

The subjective decision-making process in this case illustrates the unregulated discretion that often characterizes such systems. This Court's description of the selection system in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975), is equally apt for the process here: "There is no way of knowing precisely what criteria of job performance the supervisors were considering, whether each of the supervisors was considering the same criteria or whether, indeed, any of the supervisors actually applied a focused and stable body of criteria

of any kind." Id. at 433. The lack of a "focused and stable body of criteria" at the Bank meant that even the same decisionmaker -- Richard Burt -- used different criteria, or different weightings of the criteria, at various times.

Numerous courts have recognized that subjective decision-making procedures are inherently subject to bias.[18/] Subjective assessments often incorporate and perpetuate the racial and sexual stereotypes forbidden by Title VII. In one case, "[the interviewer] had a tendency to equate pleasant personality characteristics, and particularly an ability to work well with

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18/ See, e.g., Coble v. Hot Springs School Dist., 682 F.2d 721, 726 (8th Cir. 1982); Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835, 842 (10th Cir. 1981); Wade v. Mississippi Coop. Ext. Service, Inc., 528 F.2d 508, 518 (5th Cir. 1976); Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

others, with white people."[19/] In another, "Black agents who do not conform to the expectations White agents and especially their White group supervisors have about them, are criticized for being too aggressive and too abrasive"[20/] on supervisory evaluations for promotions. And in a recent case from the District of Columbia Circuit, the court recognized the "unconscious sexual stereotyping [used] by male evaluators": "A number of these complaints about plaintiff's lack of 'interpersonal skills' were couched in terms of her sex. One critic suggested that Hopkins needed to take a 'course at

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19/ Robbins v. White-Wilson Medical Clinic, 660 F.2d 1064, 1068 (5th Cir. 1981), vacated and remanded on other grounds, 456 U.S. 969 (1982).

20/ Segar v. Civiletti, 508 F. Supp. 690, 706 (D.D.C.1981), modified on other grounds sub. nom. Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985).

charm school.'"[21]

Many courts have also recognized that subjective procedures may be discriminatory even when they are adopted and implemented without conscious or direct discriminatory intent.[22] This recognition is confirmed by psychological studies showing that unintentional racial and sexual bias affect evaluations of employees' performance, and that these effects are exacerbated when a measurement device is highly subjective.[23] The Fifth Circuit observed many years ago that "procedures which depend almost entirely upon the subjective evaluation and favorable

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[21] Hopkins v. Price Waterhouse, No. 85-6052, slip op. at 9, 6 (D.C. Cir. Aug. 4, 1987).

[22] E.g., Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc).

[23] Evaluations are more likely to show bias when the evaluation process is ambiguous because there is less possibility for biased inferences as rating discretion becomes more circumscribed. Nieva & Gutek, Sex Effects on Evaluation, 5 Academy of Management Review 267, 270 (1980).

recommendation of the immediate foreman are a ready mechanism for discrimination against Blacks ... We and others have expressed a skepticism that Black persons dependent directly on decisive recommendations from Whites can expect non-discriminatory action." Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).[24/] Social science research confirms this observation. A comprehensive 1985 review of 74 laboratory and field experiments conducted between 1966 and 1981 concluded that both black and white raters give higher ratings to persons of

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24/ See also Royal v. Missouri Highway and Transportation Commission, 655 F.2d 159, 164 (8th Cir. 1981) ("when the evaluators themselves are not members of the protected minority ... the decision should be subject to particularly close scrutiny"); Stewart v. General Motors Corp., 542 F.2d 445, 450 (7th Cir. 1976), cert. denied, 433 U.S. 919 (1977) ("almost all of the foremen ... are white"); Barnett v. W.T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975) ("[n]onobjective hiring standards are always suspect because of their capacity for masking racial bias").

their own race.[25] Here, Watson was never rated by anyone of her own race, as Fort Worth Bank and Trust had no black officers or supervisors. Studies have also shown that people rate others' performance on a task more accurately, and express more confidence in the accuracy of their ratings, when rating someone of their own race.[26] Given the historical and continuing prevalence of whites in supervisory positions, such as at the Bank, this tendency perpetuates past discrimination. The effect is magnified further by the additional finding that black employees tend to receive more negative ratings when they constitute only a small

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[25] Kraiger & Ford, A Meta-Analysis of Ratee Race Effects in Performance Ratings, 70 J. of Applied Psychology 56 (1985).

[26] Schmitt & Lappin, Race and Sex as Determinants of the Mean and Variance of Performance Ratings, 65 J. of Applied Psychology 428 (1980).

percentage of the workforce,[27] as in this case.

Similarly, subjective evaluation systems may easily incorporate and perpetuate pernicious sex role stereotyping, a problem of particular concern to amici herein. Numerous studies have demonstrated that stereotypical conceptions have a strong effect on the evaluations of the work of men and women, especially when the evaluation criteria are ambiguous.[28] Both men and women raters show an anti-female bias when rating women for traditionally "masculine"

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[27] Kraiger & Ford, supra note 25, at 61.

[28] E.g., Nieva & Gutek, supra note 23. For example, a recent study replicated and extended a 1968 experiment in which male and female subjects were randomly assigned to read an essay with the author's name indicated as either John T. McKay or Joan T. McKay. Although the essays were identical, both male and female readers gave higher ratings to the essay authored by "John" or "J.T." than that written by "Joan." Paludi & Strayer, What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name, 12 Sex Roles 353 (1985).

jobs, such as supervisory or managerial positions.[29]

Studies have also shown that women are more vulnerable than men to bias on the basis of physical appearance. In many subjective evaluations, as in the case at hand, one of the criteria is "personal appearance." Such a criteria is more likely to have an impact on women, which can be beneficial or deleterious depending on the job at issue. Attractiveness proves to be advantageous for women in nonmanagerial positions and disadvantageous for women in managerial jobs. However, appearance has no effects on reactions to men for any type of job.[30]

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[29] Nieva & Gutek, supra note 23, at 271-73; Rosen & Jerdee, Effect of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions, 59 J. of Applied Psychology 511 (1974).

[30] Heilman & Stopeck, Being Attractive, Advantage or Disadvantage? Performance-Based Evaluations and Recommended Personnel Actions as a Function of Appearance, Sex, and Job Type, 35 Organizational Behavior and Human Decision Processes 202 (1985).

The facts of this case illustrate how subjective criteria, even if adopted and applied without direct or conscious discriminatory intent, are even more likely than objective criteria to discriminate against the groups Title VII is intended to protect. Because there were no black supervisors at the Bank, Watson was never evaluated by a person of her race. And the Bank's discretionary application of its highly ambiguous subjective criteria always worked to Watson's disadvantage, to deny her four opportunities for promotion. As Watson demonstrated at trial, the Bank's subjective policies severely impacted on other black employees as well.

B. Applying Disparate Impact Theory to Subjective Employment Practices Is Necessary to Achieve Title VII's Purposes

Title VII's disparate impact analysis applies to the subtle barriers encompassed in subjective screening devices for, as Justice

Frankfurter declared in another context, the law "nullifies sophisticated as well as simple-minded modes of discrimination."[31] The purpose and language of Title VII, its legislative history, the guidelines interpreting it, decisions of this Court, and the nature of employment decisions all compel the conclusion that the disparate impact model is available to challenge subjective practices in order to "achieve equality of employment opportunity." Griggs, 401 U.S. at 429.[32]

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[31] Lane v. Wilson, 307 U.S. 268, 275 (1939) (striking down Oklahoma's restrictive voter-registration statute under the fifteenth amendment).

[32] The majority of Courts of Appeals -- the Third, Sixth, Ninth, Tenth, Eleventh, and District of Columbia Circuits -- have held that disparate impact analysis applies to subjective criteria. See, e.g., Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982); Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477 (9th Cir. 1987) (en banc); Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985); Lasso v. Woodmen of World Life Insurance Co., Inc., 741 F.2d 1241 (10th Cir. 1984), cert. denied, 471 U.S. 1099 (1985); Griffin v. Carlin, 755 (footnote cont'd)

Title VII unequivocally proscribes all forms of employment discrimination without distinguishing between objective or subjective practices. Under Title VII it is an unlawful employment practice "to limit segregate, or classify ... employees or applicants for employment in any way.... 42

F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C.Cir. 1984), cert. denied, 471 U.S. 1115 (1985). The Fourth, Fifth, Seventh, and Eighth Circuits have reached conflicting results. See, e.g., Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 569 (4th Cir. 1985) (applying impact analysis); E.E.O.C. v. Federal Reserve Bank, 698 F.2d 633, 638-39 (4th Cir. 1983), rev'd on other grounds sub. nom. Cooper v. Federal Reserve Bank, 467 U.S. 867 (1984) (refusing to apply impact analysis); Page v. U.S. Industries, Inc., 726 F.2d 1038, 1054 (5th Cir. 1984) (applying impact analysis); Pouncy v. Prudential Insurance Co. of America, 668 F.2d 795, 802 (5th Cir. 1982) (refusing to apply impact analysis); Griffin v. Board of Regents, 795 F.2d 1281, 1288-89 and n.14 (7th Cir. 1986) (refusing to apply impact analysis); Regner v. City of Chicago, 789 F.2d 534, 539 (7th Cir. 1986) (applying impact analysis); Talley v. United States Postal Service, 720 F.2d 505 (8th Cir. 1983), cert. denied, 466 U.S. 952 (1984) (refusing to apply impact analysis); Gilbert v. City of Little Rock, 722 F.2d 1390 (8th Cir. 1983), cert. denied, 466 U.S. 972 (1984) (applying impact analysis). Only one Circuit, the Second, has refused to apply disparate impact analysis to subjective criteria. See, e.g., Rossini v. Ogilvy & Mather, Inc., 798 F.2d 590, 605 (2d Cir. 1986).

U.S.C. § 2000e-2(a) (emphasis added). In 1971, this Court construed this statutory language to prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in operation," Griggs, 401 U.S. at 431. The disparate impact model developed in Griggs sought to fulfill Congress' objective of "achiev[ing] equality of employment opportunities" by removing "artificial, arbitrary, and unnecessary barriers to employment." Id. at 429, 431.

When it enacted the 1972 amendments to Title VII, Congress endorsed the disparate impact model enunciated in Griggs[33/] and

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33/ See Connecticut v. Teal, 457 U.S. 440, 447 n.8 (1982) ("The legislative history of the 1972 amendments ... demonstrates that Congress recognized and endorsed the disparate-impact analysis employed by the Court in Griggs").

Because the nature of employment discrimination was not clearly understood when Title VII was enacted in 1964, at that time Title VII was generally thought to prohibit only intentional discrimination. A 1972 Congressional report reflected: "In 1964, employment (footnote cont'd)

recognized that employment discrimination is a "complex and pervasive phenomenon" that should be described in terms of "'systems' and 'effects' rather than simply intentional wrongs."[34/] At the time of the 1972 amendments, Congress also adopted the existing decisional law, which included cases that applied Griggs to invalidate subjective hiring standards and procedures, such as United States v. Bethlehem Steel Corp., 446 F.2d 652, 657-59 (2d Cir. 1971).

The 1972 amendments also demonstrate Congress' aim to eradicate discrimination in

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discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization .... Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs." S. Rep. No. 415, 92d Cong., 1st Sess. 5 (1971).

34/ See e.g., H.R. Rep. No. 238, 92d Cong., 2d Sess. 2, reprinted in 1972 U.S. Code Cong. & Admin. News 2137, 2144; S. Rep. No. 415, supra note 33, at 4-5.

upper level jobs, in which subjective decision-making processes are more common. For example, one of the 1972 amendments to Title VII extended its coverage to academic institutions,[35], demonstrating that Congress intended jobs such as professorships to be analyzed like other jobs. A Senate Report found:

> [I]n the higher-paying and more prestigious positions in the institutions of higher learning, blacks constituted only 2.2% of all positions, most of these being found in all-black or predominantly black institutions. Women are similarly subject to discriminatory patterns. Not only are they generally under-represented in institutions of higher learning, but those few that do obtain positions are generally paid less and advance more slowly than their male counterparts. ... The committee believes that it is essential that these employees be given the same opportunity to redress their

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35/ Pub. L. No. 92-261, § 3, 86 Stat. 103, 103-04 (1972) (codified at 42 U.S.C. § 2000e-1) (abolishing the exemption for the employment of individuals engaged in educational activities at non-religious schools).

> grievances as are available to other employees in the other sectors of business.

S. Rep. No. 415, 92d Cong., 1st Sess. 12 (1971) (emphasis added). Congress also considered and rejected a proposal to exempt another upper level occupation, physicians and surgeons. Senator Javits articulated his opposition to the proposed exemption:

> One of the things that those discriminated against have resented the most is that they are relegated to the position of the sawers of wood and the drawers of water; that only the blue collar jobs and ditchdigging jobs are reserved for them; and that though they built America, and certainly helped build it enormously in the days of its basic construction, they cannot ascend the higher rungs in professional and other life.
>
> Yet, this amendment would go back beyond decades of struggle and of injustice, and reinstate the possibility of discrimination on grounds of ethnic origin, color, sex, religion - just confined to physicians or surgeons, one of the highest rungs of the ladder that any member of a minority could attain - and thus lock in and fortify the idea that being a doctor or a surgeon is just too good for members of a minority, and that they have to

> be subject to discrimination in respect of it, and the Federal law will not protect them.

118 Cong. Rec. 3802 (1972) (statement of Sen. Javits). Congress also expanded Title VII in 1972 to include public employment. In all these instances, Congress extended Title VII protection with the awareness that the central obstacle was not overt discrimination but the covert bias embodied in "systems" and manifested in "effects."[36/]

The Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. Pt. 1607, developed by the four federal agencies charged with enforcing Title VII--the Equal Employment Opportunity Commission, the Office of Personnel Management, the Department of Justice and the Department of Labor--also interpret Title VII to require the application of the disparate impact model to

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36/ See footnote 33, supra.

all selection procedures, whether objective or subjective, by defining the selection procedures to which disparate impact applies as follows:

> Any measure, combination of measures, or procedure used as a basis for any employment decision. Selection procedures include the full range of assessment techniques from traditional paper and pencil tests, performance tests, training programs, or probationary periods and physical, educational, and work experience requirements through informal or casual interviews and unscored application forms.

29 C..F.R. § 1607.16(Q). These guidelines support the statutory language and legislative history and are therefore "entitled to great deference." Griggs, 401 U.S. at 434.

Although this Court has never explicitly addressed whether disparate impact analysis applies to subjective criteria, its decisions suggest that Title VII's proscription against practices that have discriminatory effects is available in challenges to subjective as well

as to objective selection devices. In Griggs, the seminal disparate impact case, this Court spoke broadly of "procedures," "practices," "fair in form" and "artificial, arbitrary and unnecessary barriers to employment," all terms which encompass subjective procedures.[37/] And in Teamsters v. United States, the Court recognized that "either theory [disparate impact or disparate treatment] may, of course, be applied to a particular set of facts," 431 U.S. 324, 335 n.15 (1977). In short, the Court's reasoning in Griggs and its progeny--that disparate impact analysis may reveal discrimination deeply ingrained in employment systems that would otherwise go unrecognized--applies with

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37/ 401 U.S. at 429, 431. Not one of this Court's disparate impact decisions uses the term "objective." See Griggs, 401 U.S. at 424; Dothard v. Rawlinson, 433 U.S. 321 (1977); Albemarle Paper Co. v. Moody, 422 U.S. 40[illegible] (1973); New York City Transit Authority v. Beazer, 440 U.S. 568 (1979); Connecticut v. Teal, 457 U.S. 440 (1982).

equal if not greater force to subjective devices which so readily lend themselves to individual bias.

Some courts and commentators have erroneously interpreted a footnote in Furnco Construction Corp. v. Waters, 438 U.S. 567, 575 n.7 (1978), to disapprove the use of disparate impact analysis for subjective procedures. In Furnco, the Court noted in passing that it did not use disparate impact analysis because "[t]his case did not involve employment tests...or particularized requirements such as ... height and weight specifications," id., the usual context in which disparate impact was applied. However, disparate impact analysis was inappropriate in Furnco because the plaintiffs did not prove that the practice actually had an adverse impact on black bricklayers, 438 U.S.

at 571.[38/] Thus, the prima facie case which would trigger application of the business necessity defense in disparate analysis was absent in Furnco. In contrast, in this case the disparate impact of the bank's admittedly subjective employment system has been proved: "the numbers ... belie the bank's claim that it has not discriminated against the class on the basis of race." 798 F.2d at 808 (Goldberg, J., dissenting).

All the above factors compel the use of disparate impact analysis for the subjective employment practices at issue here. In addition, to draw a bright line between objective and subjective criteria would ignore the complexity of employment decisions and would encourage employers to use

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38/ Moreover, the policy in Furnco -- a referrals-only hiring policy which prevented the supervisor from hiring anyone at the gate -- involved objective application of a hiring hall system and raised no question of subjective evaluations.

employment practices that are most likely to have a discriminatory impact.

Objective and subjective requirements are more properly viewed as "extremes on a continuum"[39/] rather than as the test for which analytic tool to use. The conclusion that a practice is not "facially neutral" because it is subjective glosses over the significant similarities between objective and subjective criteria.[40/] Subjective

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39/ Atonio v. Wards Cove Packing Co., Inc., 810 F.2d 1477, 1484 (9th Cir. 1987) (en banc).

40/ Experience requirements are an example of the type of requirement that can be objective or subjective. For example, in Kilgo v. Bowman Transportation, 570 F. Supp. 1509 (N.D. Ga. 1983), aff'd, 789 F.2d 859 (11th Cir. 1986), the employer required one year of over-the-road commercial tractor-trailer driving which, like a high school diploma, the applicants either had or did not have (although the employer sometimes discriminatorily waived the requirement). That explicitly defined experience requirement is in stark contrast to the highly variable experience requirement used at the Bank.

procedures can be as "facially neutral" as objective ones, although because of their nature it is even more likely that "prior societal discrimination has been incorporated (for perhaps non-discriminatory reasons) into the decision-making process."[41] For example, courts have labelled as subjective both practices that have no discretion and those that are highly discretionary.[42] And even an apparently "objective" component of a subjective process, such as the experience

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[41] Brief of United States as Amicus Curiae on Petition for Writ of Certiorari at 13, n.12 ("Brief of United States"). Illogically, the Solicitor General suggests that this "prior societal discrimination" has only been incorporated into objective criteria.

[42] For instance, in Pouncy v. Prudential Insurance Co., 668 F.2d 795, 799 (5th Cir. 1982), the company did not post any vacancies, a practice which encompassed no discretion. In Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981), the practice at issue was discharges based on "poor workmanship," a criterion which can either be discretionary or based on objective factors. See generally Rigler, Title VII and the Applicability of Disparate Impact Analysis to Subjective Selection Criteria, 88 W.Va.L.Rev. 25, 33-40 (1985).

requirement at Fort Worth Bank, can be applied in a discretionary fashion, so that experience at an amusement park is given more weight than experience at the Bank itself.

Not one of the courts that have held that subjective criteria may not be analyzed under disparate impact has delineated how it determined that a particular test was subjective rather than objective. Because that preliminary decision will be often be dispositive,[43/] an important practical reason for concluding that subjective criteria are

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43/ The employer's burden under the disparate treatment model is significantly less than under disparate impact analysis. Under the disparate treatment model, the employer need only explain the differential treatment, and the plaintiff must prove that the explanation is a pretext. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 804 (1973). In contrast, under the disparate impact theory the employer must demonstrate the business necessity of the discriminatory selection device. Griggs, 401 U.S. at 431. In this case, although the Bank articulated "somewhat inconsistent," 798 F.2d at 799, reasons for rejecting Watson, it did not offer any evidence as to the business necessity of its procedure nor could it have, as the criteria had not been subject to even minimal validation.

subject to impact analysis is that courts will avoid the enormous and difficult task of deciding whether a procedure should be labelled objective or subjective.

Excluding subjective practices from the reach of disparate impact analysis serves no legitimate purpose and would encourage employers to abandon validated objective criteria in favor of discretionary hiring methods. If subjective practices are exempted from the same stringent analysis accorded objective devices with discriminatory effects, "[r]ather than validate education and other objective criteria, employers could simply take such criteria into account in subjective interviews or review panel decisions."44/ It would be ironic indeed if patently neutral but objective devices received less judicial

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44/ Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985).

deference than inherently suspect subjective ones. For, "[i]f, in fact, the subjective practices are a 'covert means' to discriminate intentionally, by definition intent will be difficult to prove."[45/] Encouraging employers to insulate their discriminatory employment decisions from review cannot be reconciled with Congress' determination to "achieve equality of employment opportunity." Griggs, 401 U.S. at 429.

C. Applying Disparate Impact Analysis to Subjective Criteria is Not Burdensome to Employers

Employers who seek to use subjective criteria that discriminate have to make the same showing as employers who use objective criteria that discriminate--to demonstrate "business necessity" by showing that the discriminatory practice has "a manifest

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45/ Atonio v. Wards Cove Packing Co., Inc., supra, 810 F.2d at 1484.

relationship to the employment in question." Griggs, 401 U.S. at 431, 432. Business necessity is traditionally proved by showing that "a discriminatory employment practice [is] necessary to safe and efficient job performance." Dothard v. Rawlinson, 433 U.S. 321, 332 n.14 (1977). As the amicus brief filed in support of petitioner by the American Psychological Association ("APA") demonstrates, subjective criteria can be professionally validated in accord with Griggs business necessity requirements with the same ease as objective devices. Amici herein rely on the APA's exposition of how subjective criteria, including the criteria used in this case, can and should be scientifically validated.

The ease with which validation requirements may be applied to subjective criteria dispels the premise behind the

Solicitor General's[46/] opposition to disparate impact analysis for subjective criteria: that employers will be forced to the choice of replacing subjective criteria with objective tests or of instituting quotas. The facts in this case and other cases where subjective criteria have been challenged also contradict the Solicitor General's position; far from being unduly burdened with demonstrating the validity of subjective testing, employers whose subjective employment practices have been found to discriminate have not made even minimal attempts to demonstrate business necessity.

Most often, subjective criteria have failed the business necessity test because, like here, the employer has not offered any

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[46/] Brief of United States at 15.

justification for the subjective device.[47/] For example, in Hawkins v. Bounds, 752 F.2d 500 (10th Cir. 1985), the court invalidated the Post Office's practice of promotions based on "detailing," i.e., promoting those employees who had been temporarily appointed to higher level positions. Black employees had never been "detailed" and the Post Office had no guidelines for making the temporary appointments. The court found that "[t]he record in this case contains no evidence tending to show that the practice of totally

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47/ In other cases the employer offered only a patently flimsy business justification for its discriminatory subjective criteria. For example, in Grant v. Bethlehem Steel Corp., 635 F.2d 1007, 1011 (2d Cir. 1980), cert. denied, 452 U.S. 940 (1981), the employer defended its practice of selecting foremen through "word-of-mouth on the basis of wholly subjective criteria" only by citing the dangerousness of ironwork and opining that no other method of selection would work. The court found that these reasons did not constitute business necessity because the plaintiffs showed that the superintendents selected those who were their friends, that many of those so selected had bad safety records and had less experience as ironworkers than the black plaintiffs. Id. at 1010.

discretionary detailing or its use in the promotion procedure were required by business necessity." Id. at 504 (emphasis added). Similarly, in Crawford v. Western Electric Co., Inc., the employer did not "present ... a scintilla of evidence to demonstrate a business necessity for the mechanics of an Index Review System which allows supervisors to make wholly subjective evaluations of employees, without simultaneously making written records of their reasons," 745 F.2d 1373, 1386 (11th Cir. 1984) (emphasis added).[48/]

48/ See also, e.g., E.E.O.C. v. Rath Packing, 787 F.2d 318, 328 (8th Cir. 1986) (the employer "was unable to identify the criteria and qualifications which were considered in the hiring decisions"); Lewis v. Bloomsburg Mills, Inc., 773 F.2d 561, 570 (4th Cir. 1985) (testimony offered to prove business necessity "of vaguest sort, consisting essentially of general assertions"); Brito v. Zia Co., 478 F.2d 1200, 1205 (10th Cir. 1973) ("[t]he Zia Company ... failed to introduce evidence of the validity of its employee performance evaluation test consisting of empirical data demonstrating that the test was significantly correlated with significant elements of work behavior").

In some cases the employers' standards have been so vague or nonexistent that it was impossible for the court to begin even a rudimentary inquiry into business necessity. For example, this Court observed in Albemarle Paper Co. v. Moody, 422 U.S. 405, 433 (1975), that a validation test where supervisors were asked to rank groups of employees as to who "did a better job" was "extremely vague and fatally open to divergent interpretations":

> There is no way of knowing precisely what criteria of job performance the supervisors were considering.... There is, in short, simply no way to determine whether the criteria actually considered were sufficiently related to the Company's legitimate interest in job-specific ability to justify a testing system with a racially discriminatory impact.

Id. at 433 (emphasis in original) (footnote omitted).

Courts have upheld subjective criteria when they have found that the employer

demonstrates business necessity.[49/] For example, in Wilson v. Michigan Bell Telephone Co., 550 F.Supp. 1296 (E.D.Mich. 1982), the court found[50/] that an "assessment center" process for potential salesmen was justified by business necessity. In so holding, it relied on an article in the Journal of Applied Psychology finding that ratings Bell System assessment centers bore a strong relationship to subsequent job performance, and on testimony of a black female member of the assessment staff who had participated in

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49/ Although the business necessity test should be applied to require both an analysis of the requirements of the job and whether the subjective criteria measure those requirements, in fact courts have sometimes upheld the use of subjective criteria so long as discretion is circumscribed and there are procedural safeguards. See e.g., E.E.O.C. v. E.I. du Pont de Nemours & Co., 445 F.Supp. 223 (D.Del. 1978) (upholding a subjective supervisor system because of precedural safeguards). Amici submit that such safeguards, while important, are not a substitute for validation.

50/ This was an alternative holding. The court also held that disparate impact had not been proved. 550 F. Supp. at 1300.

the assessment of plaintiff. Id. at 1300-01.

Far from burdening employers, subjecting discriminatory subjective criteria to validation will promote Title VII's goals and lead to better merit selection for all employees.[51/] If employers know that their discriminatory subjective practices can be challenged under disparate impact analysis, they will be motivated to adopt criteria that are tailored to job requirements instead of variable and ambiguous policies like those used at the Bank. "[A] primary objective of Title VII is prophylactic: to achieve equal employment opportunities and to remove barriers that have operated to favor white males over other employees." Teamsters v. United States, supra, 431 U.S. at 364. Many

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51/ It should be noted in this context that Kevin Brown, the employee selected over Watson for the fourth promotion, subsequently received poor performance ratings and soon resigned from the Bank. See footnote 7, supra.

of the objective tests struck down under Title VII had little relevance to the qualities demanded by the job and have been replaced by criteria that more accurately measure job requirements. For example, New York City firefighters were once selected based on their knowledge of such words as "attest", "luminous," and "irate." Vulcan Soc'y of the N.Y. City Fire Dep't v. Civil Service Comm'n, 490 F.2d 387, 397 n.12 (2d Cir. 1973). As a result of suits brought by both minority group members and women, New York City firefighters are now selected from tests that more closely (but not perfectly, in the view of the amici) measure fire-fighting abilties, such as a simulation of engine company and ladder company tasks. See Berkman v. City of New York, 812 F.2d 52, 54-55 (2d Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3017 (July 13, 1987).

The Solicitor General's argument that subjective practices should be shielded from disparate impact scrutiny in order to protect traditional "management prerogatives" and "union freedoms," Brief of U.S. at 15, would effectively immunize subjective practices from Title VII review. Although Title VII leaves considerable discretion to employers,[52/] it does not insulate any particular subset of discriminatory job decisions from review. The employer in Griggs exercised its "management prerogative" by requiring a high school diploma and intellegence tests--"the Company ... judg[ed] that they generally would improve the overall

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52/ As Professor Bartholet points out, "[o]ne of the great advantages of the Griggs approach is that, by focusing on results and proof of job-relatedness, it gives the employer maximum freedom to design employment systems; the sole constraint is that the systems must not [discriminate] unless there is a powerful justification for their doing so." Bartholet, Application of Title VII to Jobs in High Places, 95 Harv. L.Rev. 947, 1008 (1982).

quality of the workforce," 401 U.S. at 431--but the discriminatory employer policies in Griggs, like those at issue here, had to be justified by business necessity. Here, Clara Watson prevails under a disparate impact analysis, because the Bank did not offer any evidence to establish the business necessity of its discriminatory subjective policies.

II. WATSON ALSO MADE A SUFFICIENT SHOWING TO PREVAIL UNDER DISPARATE TREATMENT ANALYSIS

As noted above, this Court held in Teamsters v. United States, that either theory of Title VII liability, i.e. disparate impact or disparate treatment, may be applied to a particular set of facts. 431 U.S. at 335 n.15. In addition to proving her case under the disparate impact theory, Watson also adduced sufficient facts to prevail under the classwide[53/] disparate treatment

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53/ The class here was ultimately de-certified and the class action question is not before this Court. However, lower courts which have addressed the use of classwide statistics in individual cases have held that classwide statistical evidence alone may establish a prima facie case of employment discrimination in an individual as well as class action case, e.g., Davis v. Califano, 613 F.2d 957, 962 (D.C. Cir. 1979), or that classwide statistical evidence is relevant and probative in individual cases, e.g., Sweat v. Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) (statistics relevant to showing pretext); Anderson v. City of Albuquerque, 690 F.2d 796, 802 (10th Cir. 1982) (de-certified class); Kaplan v. International Alliance of Theatrical and Stage Operators, 525 F.2d 1354, 1358 (9th Cir. 1975); King v. Yellow Freight System, Inc., 523 F.2d 879, 882 (8th Cir. 1975) (statistics relevant to motive and (footnote cont'd)

approach outlined in Teamsters. In fact, it was for this very reason that Judge Goldberg, in his dissent below, found it unnecessary even to reach the question of whether disparate impact theory applied to these facts. 798 F.2d at 808 & n.17. As required under Teamsters, Watson demonstrated through her statistical studies a "pattern or practice of resistance to the full enjoyment of Title VII rights." 431 U.S. at 336. Her unrebutted statistical evidence proved more than "the mere occurrence of isolated or 'accidental' and or sporadic discriminatory acts." Id.

> ... Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination...
> "In many cases the only available avenue of proof is the use of racial

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intent); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 247 (10th Cir. 1970), cert. denied, 401 U.S. 954 (1971). Indeed Watson could also prevail under the individual disparate treatment approach of McDonnell Douglas and Burdine, see infra.

> statistics to uncover clandestine and covert discrimination ..."

Id. at 339 n.20 (quoting United States v. Ironworkers Local 86, 443 F.2d 544, 551 (9th Cir.), cert. denied, 404 U.S. 984 (1971)).

Under the disparate treatment approach a plaintiff must prove intent to discriminate. This Court, however, has made it clear that a statistical showing alone, if sufficiently strong, will establish the requisite intent.[54/] A Title VII plaintiff may establish a prima facie case of disparate treatment using statistics alone if the statistics show a "gross disparity" in treatment of workers based upon a prohibited factor such as race. E.g. Hazelwood School District v. United States, 433 U.S. 299, 307-

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54/ Watson also introduced direct evidence of intent to discriminate, e.g., the comments of Gary Shipp to the effect that blacks could not handle large sums of money, Tr. I18-19, and the fact that as of 1973 no blacks were placed in positions of visibility to the Bank's customers. 798 F.2d at 808 (Goldberg, J., dissenting).

08 (1977). This Court has also held that a statistical showing of disparate treatment reaches this required level of "gross disparity" when the difference between the expected treatment and the actual treatment of a protected class is greater than two or three standard deviations. Castaneda v. Partida, 430 U.S. 482, 496-97 n.17 (1977); Hazelwood, 433 U.S. at 311 n.17. In contrast, a "marked disproportion" has been deemed sufficient to prove disparate impact, since intent is irrelevant. Rivera v. City of Wichita Falls, 665 F.2d 531, 535 n.5 (5th Cir. 1982). Watson's statistical evidence clearly met the prerequisite for a disparate treatment showing. The gross statistical disparities shown here, coupled with a subjective system which is inherently suspect, is more than sufficient to make such a case.

Here both anecdotal evidence and gross

racial disparities resulting from the use of subjective devices have been shown. However, when as in the instant case the statistical evidence is also finely tuned to the relevant labor pool, as opposed to the general population or workforce as relied upon in Teamsters itself, a lesser showing than that made here would permit an inference of intentional discrimination, see Segar v. Smith, 738 F.2d 1249, 1278 (D.C.Cir. 1984), cert. denied, 471 U.S. 1115 (1985) (citing B. Schlei & P. Grossman, Employment Discrimination Law 1371 (1983)). "[W]hen a plaintiff's statistical methodology focuses on the appropriate labor pool and generates evidence of discrimination at a statistically significant level, no sound policy reason exists for subjecting the plaintiff to the additional requirement of either providing anecdotal evidence or showing gross disparities." Id.

In order to dispel the inference of classwide disparate treatment which must be drawn in a case such as the instant one, an employer is required to show that the plaintiff's proof is "either inaccurate or insignificant." Teamsters, 431 U.S. at 360, or to provide a "nondiscriminatory explanation for the apparently discriminatory result". Id. at n.46. The employer's defense must be designed to meet the prima facie case presented by the plaintiff. Id.

Here, the bank made almost no effort whatever to rebut Watson's overwhelming statistical showing, 798 F.2d at 812 n.24, and indeed could not have, considering the overwhelming nature of Watson's statistical evidence. This is not a case where a plaintiff relied upon "naked comparison[s]" without regard to factors other than race which might have explained the disparate results. Pouncy v. Prudential Insurance

Co. of America, 499 F. Supp 427, 449 (S.D.Tex. 1980), aff'd, 668 F.2d 795, 802 (5th Cir. 1982). Watson presented sophisticated regression analyses which controlled for such factors. In any event, as Judge Goldberg noted, "[a]bsent proof to the contrary courts should decline to assume that blacks and whites do not possess the relevant qualifications in equal proportions." 798 F.2d at 812 (citing Payne v. Travenol, 673 F.2d 798, 822 (5th Cir. 1982); De Medina v. Reinhardt, 686 F.2d 997, 1008 (D.C. Cir. 1982)).[55/]

The Bank did, of course, articulate allegedly non-discriminatory reasons for denying Watson a promotion in each individual instance. Except for their internal

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55/ See also Teamsters, 431 at 339 n.20 ("absent explanation, it is ordinarily to be expected that non-discrimination will in time result in a workforce more or less representative of the racial and ethnic composition of the population in the community from which the employees are hired ...").

inconsistencies these excuses might have sufficed in an ordinary individual disparate treatment case under McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).[56/] However, the

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[56/] This case, of course, was not a classic McDonnell Douglas/Burdine individual disparate treatment case even though it might, in other circumstances, have been presented in that model. McDonnell Douglas is not "the only means of establishing a prima facie case of individual discrimination. [This Court's] decision in that case ... did not purport to create an inflexible formulation." Teamsters, 431 U.S. at 358 (emphasis in original.) Even under the McDonnell Douglas/Burdine model it is clear that the requirement of articulating a reason which is both "legitimate" and "non-discriminatory" has substantive connotations. The "legitimacy" of the conduct is to be judged to the extent by which it has "a rational and neutral business justification," McDonnell Douglas, 411 U.S. at 806 n.20. The bank did not demonstrate any business justifications for its subjective decisions (see supra). Second, the reason must be "applied alike to members of both races." Id. at 804. If the "assigned reason was ... discriminatory in its application," the defense fails. Id. at 807. Moreover, the non-discriminatory justification (subjective criteria here) cannot be said to be "non-discriminatory" if it operates disproportionately to burden blacks.

If nothing else, Watson's statistical evidence demonstrates that the Bank's proffered excuses for denying her promotions were pretextual.

classwide statistical showing made here was never adequately explained. In cases where a prima facie showing of classwide discrimination has been made, such unrebutted classwide statistical proof creates an inference of discrimination against individual class members, thus shifting the burden to the employer to show that individual class members were not victims of the proven pattern and practice of racial discrimination, Franks v. Bowman Transportation Co., 424 U.S. 747, 772 (1976). As this Court stated in Teamsters:

> Although the prima facie case [does] not conclusively demonstrate that all of the employer's decisions were part of the proved discriminatory pattern and practice, it [does] create a greater likelihood that a single decision was a component of the overall pattern. Moreover, the finding of a pattern or practice chang[es] the position of the employer to that of a proven wrongdoer.

431 U.S. at 359 n.45.

In sum, even without reliance upon the disparate impact model, Watson and other minorities and women who are subjected to highly subjective employment selection criteria and who demonstrate through the use of statistics that these devices have in fact resulted in a gross disparity in their representation in the particular workforce generally, or in a particular salary or promotional level, may prevail under a disparate treatment model because discriminatory intent "can in some instances be inferred from the mere fact of difference in treatment," Teamsters, 431 U.S. at 335 n.15. This is such a case. If this "most obvious evil," id., is ever to be rooted out of our system, Title VII plaintiffs must not be deprived of the statistical tools to demonstrate the reality of the bias inherent in subjective selection devices.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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APPENDIX

Statements of Interest of *Amici Curiae*

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU has established the Women's Rights Project to work towards the elimination of the pervasive problem of gender-based discrimination. It has participated, both directly and as *amicus curiae*, in the litigation of many cases before the Supreme Court and other courts challenging sex discriminatory practices. The Texas Civil Liberties Union Foundation, the Texas affiliate of the ACLU, joins in this brief.

The NOW Legal Defense and Education Fund ("NOW LDEF") was founded in 1970 by leaders

of the National Organization for Women as a non-profit civil rights organization to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. A major goal of the NOW LDEF is the elimination of barriers that deny women economic opportunities. In furtherance of that goal, NOW LDEF has participated in numerous cases to secure full enforcement of laws prohibiting employment discrimination.

The Women's Legal Defense Fund is a non-profit membership organization founded in 1971 to provide pro bono legal assistance to women who have been the victims of discrimination based on sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an

employment discrimination counseling program, and advocacy before the Equal Employment Opportunity Commission and other federal agencies charged with enforcement of the equal opportunity laws.